Federal Court  Cour fédérale

Date: 20230421

Docket: IMM-3001-22

Citation: 2023 FC 582

Ottawa, Ontario, April 21, 2023

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

RAAKULAN SATKUNATHAS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Mr. Raakulan Satkunathas, seeks judicial review of the decision of the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada to terminate his pending refugee protection proceedings because the Applicant's claim for protection was determined to be ineligible pursuant to s 104(2)(a.1) of the *Immigration Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

Background

[2] The Applicant is a citizen of Sri Lanka. He fled to the United States of America [US] where he initiated a refugee claim in 2019. His claim was denied on January 31, 2020, and an appeal was rejected on September 14, 2020. The Applicant was then detained until he was "released on parole" in March 2021. He entered Canada on April 22, 2021.

[3] At the point of entry [POE], he was interviewed by a Canada Border Services Agency [CBSA] officer and disclosed that he had unsuccessfully claimed asylum in the US, as recorded in his Declaration made on that date. The CBSA processing officer's notes dated April 22, 2021 indicate that the Applicant had stated that his brother is a refugee claimant currently residing in Canada. The officer stated in their notes that it was more probable than not that the two were related and, therefore, recommended that the Applicant be found eligible to have his claim referred to the RPD as the Applicant met an exception to the Safe Third Country Agreement. These notes did not refer to the Applicant's unsuccessful refugee claim made in the US. The Minister Delegate's Notes of the same date indicate that the processing officer had presented their file, repeated the above information and, based on that information, found that the Applicant fell under an exception to the Safe Third Country Agreement. The Minister's Delegate also found that the Applicant did not fall within any other ineligibilities to s 101(1) of the *IRPA* and, therefore, found that the Applicant was eligible to have his claim forwarded to the RPD.

[4] On June 10, 2021, the Applicant submitted his Basis of Claim [BOC] form and narrative.

[5] On July 2, 2021, the Applicant was sent a letter from the Integrated Claim Analysis Center [ICAC] concerning disclosure of documents from the ICAC. The letter explained that the enclosed documents had been sent to the RPD for consideration in the Applicant's refugee claim. Enclosed was an ICAC "Checklist to the IRB" indicating the documents reviewed and the content of the document disclosure package. This included the Declaration, the processing officer's notes, the Minister's Delegate's Notes, and a Report on Biometric Information dated June 28, 2021, which report indicated the Applicant's entry into the US.

[6] On January 17, 2022, the RPD wrote to the Applicant notifying him, pursuant to Rule 28(1)(c) of the *Refugee Protection Division Rules,* SOR/2012-256 [*RPD Rules*], that the RPD believed that his claim may come under s 101(1)(a) to (e) or 104(c) or (d) of the *IRPA* and, as such, be ineligible. More specifically, that before making a claim for refugee protection in Canada, the Applicant had made a claim for protection in another country, as indicated in his Schedule A form (which was completed at the POE). The RPD sent another letter on the same date confirming that it had received the Applicant's BOC and requesting all additional information relating to the rejection of his US asylum claim, as referenced in his referral information.

[7] On January 27, 2022, a Minister's Representative at Immigration, Refugees and Citizenship Canada [IRCC] acknowledged the RPD's Rule 28 Notice and advised that the Minister was awaiting biometric information sharing results to confirm if the Applicant had made a refugee protection claim in a country other than Canada and that the Minister would respond when the results were received. By letter dated February 24, 2022, sent to the RPD and

the Applicant's counsel, the Minister's Representative advised that confirmation had been received in accordance with an information sharing agreement or arrangement entered into by Canada with the authorities of the US that the Applicant had made an asylum claim in the US. Accordingly, the Applicant's refugee claim made in Canada was being referred to the originating refugee intake office for a redetermination of the Applicant's eligibility to have his claim heard by the RPD. The Minister's Representative advised that once a redetermination was processed, a notification of ineligible refugee claim pursuant to s 104(1) and s 104(2) of the *IRPA* would be sent to the Applicant and the RPD.

[8] On March 10, 2022, the CBSA wrote to the Applicant in response to his application for refugee protection in Canada and advised that the CBSA had reviewed his application and, pursuant to s 104(1)(a.1) or 101(1)(c.1) of the *IRPA*, which provisions were set out in the letter, that the CBSA had determined that his claim for refugee protection was ineligible to be referred to the RPD. The letter states that Minister had relied on the information, in accordance with an information sharing agreement with the US, confirming that the Applicant filed an application for asylum in the US, a copy of which application had been obtained by the Minister. Based on this, the Minister was satisfied that the Applicant's refugee claim in Canada was ineligible to be referred to the RPD. Attached was a "Notification of Ineligible Refugee Claim Pursuant to 104(1) and 104(2) of the *Immigration and Refugee Protection Act*" dated March 10, 2022.

[9] On March 17, 2022, the RPD wrote to the Applicant advising him that the CBSA had notified the RPD that the Applicant's claim for refugee protection was ineligible to be determined by the RPD. The RPD stated:

> In accordance with paragraph 104(2)(a.1) of the *Immigration and Refugee Protection Act*, the pending proceedings before the RPD regarding your claim for refugee protection are terminated. This means your refugee claim file will be closed and there will be no more proceedings with respect to your claim.

[10] This decision is the subject of the Applicant's application for judicial review.

Relevant Legislation

Immigration and Refugee Protection Act, SC 2001, c.27

> **Ineligibility**
>
> 101 (1) A claim is ineligible to be referred to the Refugee Protection Division if
>
> …
>
> (c.1) the claimant has, before making a claim for refugee protection in Canada, made a claim for refugee protection to a country other than Canada, and the fact of its having been made has been confirmed in accordance with an agreement or arrangement entered into by Canada and that country for the purpose of facilitating information sharing to assist in the administration and enforcement of their immigration and citizenship laws;
>
> ….
>
> **Notice of ineligible claim**
>
> 104 (1) An officer may, with respect to a claim that is before the Refugee Protection Division or, in the case of paragraph (a.1) or (d), that is before or has been determined by the Refugee Protection Division or the Refugee Appeal Division, give notice that an officer has determined that

(a) the claim is ineligible under paragraphs 101(1)(a) to (e), other than paragraph 101(1)(c.1);

(a.1) the claim is ineligible under paragraph 101(1)(c.1);

(b) the claim is ineligible under paragraph 101(1)(f);

(c) the claim was referred as a result of directly or indirectly misrepresenting or withholding material facts relating to a relevant matter and that the claim was not otherwise eligible to be referred to that Division; or

(d) the claim is not the first claim that was received by an officer in respect of the claimant.

Termination and nullification

(2) A notice given under the following provisions has the following effects:

(a) if given under paragraph (1)(a), (b) or (c), it terminates pending proceedings in the Refugee Protection Division respecting the claim;

(a.1) if given under paragraph (1)(a.1), it terminates pending proceedings in the Refugee Protection Division or, in the case of an appeal made by the claimant, the Refugee Appeal Division, respecting the claim; and

(b) if given under paragraph (1)(d), it terminates proceedings in and nullifies any decision of the Refugee Protection Division or the Refugee Appeal Division respecting a claim other than the first claim.

Refugee Protection Division Rules, SOR/2012-256

Notice of possible inadmissibility or ineligibility

28 (1) The Division must without delay notify the Minister in writing and provide the Minister with any relevant information if the Division believes that

…..

(c) the claimant's claim may be ineligible to be referred under section 101 or paragraph 104(1)(c) or (d) of the Act.

> **Disclosure to claimant**
>
> (2) The Division must provide to the claimant a copy of any notice or information that the Division provides to the Minister.
>
> **Continuation of proceeding**
>
> (3) If, within 20 days after receipt of the notice referred to in subrule (1), the Minister does not notify the Division that the proceedings are suspended under paragraph 103(1)(a) or (b) of the Act or that the pending proceedings respecting the claim are terminated under section 104 of the Act, the Division may continue with the proceedings.

Issue and Standard of Review

[11] The Applicant submits that the sole issue is whether the RPD erred in determining that his refugee claim proceedings are to be terminated in that it made erroneous findings of fact without regard to the evidence properly before it, and that the decision was unreasonable given the evidence before the RPD. Despite this submission, the Applicant's arguments revolve around an asserted breach of procedural fairness, specifically his legitimate expectation that he be informed of the decision maker's concerns. When appearing before me the Applicant indicated that the correctness standard of review is applicable.

[12] In assessing the merits of the RPD's decision, the standard of review of reasonableness applies (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 23, 25 [*Vavilov*]).

[13] Issues of procedural fairness are to be reviewed on a correctness standard (see: *Mission Institution v Khela*, 2014 SCC 24 at para 79 [*Khela*] *Canada (Citizenship and Immigration) v*

Khosa, 2009 SCC 12 at para 43). In *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 the Federal Court of Appeal held that although the required reviewing exercise may be best – albeit imperfectly – reflected in the correctness standard, issues of procedural fairness do not necessarily lend themselves to a standard of review analysis. Rather, the Court is to determine whether the proceedings were fair in all of the circumstances.

Analysis

[14] The Applicant's argument is that when interviewed by the CBSA at the POE, he disclosed that he had unsuccessfully sought refugee protection in the US and, at that time, also indicated this in his Schedule A form. However, the CBSA did not raise this as an issue and allowed the Applicant to enter Canada and referred his claim to the RPD. Further, despite the subsequent submission of his BOC on June 10, 2021, and the June 28, 2021 biometrics report, which both mentioned that he had been in the US, he was not informed that his claim in the US was a concern. This "reaffirmed his legitimate expectation" that his claim was progressing and he would be scheduled for a hearing.

[15] The Applicant submits that it was not until January 17, 2022, that the RPD informed him that he was ineligible because of his prior claim made in the US and that this was unreasonable because the CBSA and the RPD knew of his prior US claim. Further, the biometrics report was dated June 28, 2021, thus for seven months prior to the RPD terminating his proceeding, he was under a reasonable assumption that his claim was progressing. In short, that there was 10-month delay in communicating the ineligibility to him and there was no justifiable reason for not notifying him in June 2021, when the biometrics report was received. He submits that this

"violates the Applicant's procedural rights, particularly, his legitimate expectation, be informed of the decision maker's concern, and processing without undue delay".

[16] The Applicant's submissions are without merit.

[17] First, the Applicant's written submissions do not address s 104(1) of the *IRPA*. This explicitly permits an officer "*with respect to a claim that is before the Refugee Protection Division* or, in the case of paragraph (a.1) or (d), that is before or has been determined by the Refugee Protection Division or the Refugee Appeal Division, give notice that an officer has determined" that the claim is ineligible. In other words, even if the CBSA should have recognized, pursuant to s 101(1)(c.1), that the Applicant was ineligible at the POE and should not have initially referred the Applicant's claim to the RPD, this does not entitle the Applicant to a hearing on the merits of his refugee claim.

[18] The *RPD Rules* set out a process by which the RPD must give notice to the Minister and the Applicant if it believes the claimant's claim may be ineligible to be referred by s 101 or 104(c) or (d) of the *IRPA*. As seen from the above background facts, the RPD followed that process. The Applicant does not challenge this. The Minister's Representative obtained confirmation from the US authorities that the Applicant had sought refugee protection there and referred the matter back to the CBSA for redetermination. Once the CBSA made the redetermination, the RPD advised the Applicant that it was terminating his refugee proceeding due to ineligibility. I see no error in this process. Nor did the RPD make an "erroneous determination" as the Applicant submits.

[19] Second, given this statutory process, the Applicant could not have reasonably held a legitimate expectation that his refugee claim would be processed when the RPD formed the view that he was ineligible. Further, *when* the RPD made that determination is not relevant in light of s 104(1) of the *IRPA*, which explicitly contemplates that notice of a belief that a claim is ineligible can be given with respect to a claim *that is before the RPD*. That is, there is no temporal restriction just because a claim is referred to the RPD and is proceeding towards a hearing. Indeed, that notice can even be made *after* the RPD or RAD have made determinations of the claim at issue (*IRPA* s 101(1)(c.1) and s 104(1)(a.1)).

[20] In *Canada (Citizenship and Immigration) v Dela Furnte*, 2006 FCA 186, referenced by the Respondent, the Federal Court of Appeal addressed two certified questions, the first of which was whether the doctrine of legitimate expectations could be relied upon to avoid the application of s 190 of the *IRPA*. That Court held it could not:

> [19] The issue raised by the first question can be disposed of rapidly. Section 190 of *IRPA* is clear and unambiguous. It provides that if an application is pending or in progress on June 28, 2002, *IRPA* applies without condition. The doctrine of legitimate expectations is a procedural doctrine which has its source in common law. As such it does not create substantive rights and cannot be used to counter Parliament's clearly expressed intent (*Canada (M.E.I.) v. Lidder*, [1992] F.C.J. No. 212 (F.C.A.) at paras. 3 and 27).
>
> [20] Moreover, the representations made to the Respondent were factually accurate. The argument advanced by the Respondent is that the officials had a positive duty to forewarn her and her husband that pending legislation could impact on the husband's status. There is no basis in law for imposing such a duty.
>
> [21] I would therefore answer the first certified question in the negative.

[21] Similarly here, the Applicant cannot avoid the application of s 104 of the *IRPA* based on the doctrine of legitimate expectations.

[22] Indeed, the Applicant concedes in his own submissions that the doctrine of legitimate expectations, upon which he relies, does not create substantive rights (citing *Baker v Canada (Citizenship and Immigration)*, [1999] 2 SCR 817 at para 26; *Reference re Canada Assistance Plan (BC)*, [1991] 2 SCR 525 at p 557; see also *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 97; *Bell Canada v British Columbia Broadband Association*, 2020 FCA 140 at para 118*; Canada (Attorney General) v Honey Fashions Ltd*, 2020 FCA 64 at para 50).

[23] When appearing before me, counsel for the Applicant also conceded that, given the legislative regime, the outcome is inevitable. The Applicant will be found to be ineligible. Despite this, the relief sought is to refer the matter back to the RPD – not in the hope of a different decision – but to buy time in Canada so that the Applicant can pursue other avenues in an attempt to be permitted to stay in Canada, such as seeking a pre-removal risk assessment. This ignores that the role of the Court on judicial review is to determine if the decision under review was made in accordance with the rule of law (*Khela* at para 37; *Vavilov* at paras 2, 82; *Gomes v Canada (Citizenship and Immigration)*, 2020 FC 506 at para 27). If a decision is reasonable and made in a procedurally fair manner, then the Court will not grant judicial review.

[24] In my view, even if CBSA erred in initially finding the Applicant eligible to have his claim referred to the RPD, the mistake is of no matter and cannot effect the outcome given that

ss 104(1)(a.1), 104 (2)(a.1) and s 101(1)(a.1) of the *IRPA* permit the RPD to terminate the pending claim due to the Applicant's ineligibility. Further, even if there was an initial mistake made by CBSA, it would be inconsistent with the objective of the *IRPA*'s legislative scheme for the RPD to proceed with a hearing of the Applicant's claim when it was known that the Applicant was ineligible due his prior claim for protection in the US (see, for example, *Shaka v Canada (Citizenship and Immigration*, 2019 FC 798 at paras 52-53).

[25] Finally, with respect to the Applicant's assertion that the duty of procedural fairness has been breached because of the delay in informing him of the issue of his ineligibility, I would observe that the Applicant has also failed to demonstrate how he was prejudiced by the asserted 10-month delay, that the delay was inordinate and that it directly caused him significant prejudice (see *Law Society of Saskatchewan v Abrametz*, 2022 SCC 29 at para 43).

Conclusion

[26] For the reasons above, I find that the RPD's process was in compliance with the legislative regime. The doctrine of legitimate expectations has no role in these circumstances. The Applicant has also not established that the alleged delay in notifying him of his ineligibility caused him any prejudice and, given the underlying factual and legislative matrix, the outcome was inevitable. The decision was correct and reasonable.

JUDGMENT IN IMM-3001-22

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed;

2. There shall be no order as to costs; and

3. No question of general importance for certification was proposed or arises.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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